No. 92-780

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONSE OF VITAL-MED LABORATORIES, INC. TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review a decision of the Seventh Circuit Court of Appeals which as to Vital-Med Laboratories, Inc. upheld the dismissal of Count I of Petitioners' Second Amended Complaint in that Petitioners failed to adequately allege any violations of the Sherman Act and where Petitioners have failed to show any conflict with any decision of this Court or with the decisions of any Circuit Court of Appeals.

RULE 29.1 STATEMENT

Vital-Med Laboratories, Inc. has no parent or subsidiary companies. Vital-Med was owned by Dr. Samuel Shih and Washington National Insurance Company.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
PETITIONERS HAVE FAILED TO SHOW THAT THE SEVENTH CIRCUIT'S OPINION AFFIRMING DISMISSAL OF PETITIONERS' SECOND AMENDED COMPLAINT CONFLICTS WITH ANY DECISION OF THIS COURT OR WITH THE DECISIONS OF ANY CIRCUIT COURT OF APPEALS AND THE PETITION RAISES NO QUESTION WORTHY OF THE GRANTING OF A WRIT OF CERTIORARI ..	6
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	PAGE
Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940)	4, 13, 14
Atlantic Richfield Co. v. USA Petroleum Co., 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)	7
Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1335 (7th Cir. 1986), *reh'g denied en banc*, 788 F.2d 1223 (7th Cir. 1986)	11
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)	7
Bunch v. Artec Int'l Corp., 559 F. Supp. 961 (S.D.N.Y. 1983)	7
Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977)	10
Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920)	12, 13, 14
Chrysler Corp. v. Fedders Corp., 643 F.2d 1229 (6th Cir. 1981), *cert. denied*, 454 U.S. 893 (1981)	10
Determined Productions, Inc. v. R. Dakin & Co., 514 F. Supp. 645 (N.D.Cal. 1979), *aff'd without op.*, 649 F.2d 866 (9th Cir. 1981)	11
Eastway Constr. Corp. v. New York, 762 F.2d 243 (2nd Cir. 1985)	10
Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980)	10
Motown Record Corp. v. Solinger, 441 U.S. 908 (1979)	8
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1981)	12, 13

National Collegiate Athletic Assoc. v. Board of Regents, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) 11

Northeast Women's Center, Inc. v. McMonagle, 670 F. Supp. 1300 (E.D.Pa. 1987) 9

Polk Bros., Inc. v. Forest City Ent., Inc., 776 F.2d 185 (7th Cir. 1985) 11

Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660 (7th Cir. 1982) .. 7, 10

Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982) 7

Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 732 F.2d 1403 (9th Cir. 1984) 9

Solinger v. A & M Records, Inc., 586 F.2d 1304 (9th Cir. 1978), *cert. denied sub nom. Motown Record Corp. v. Solinger*, 441 U.S. 908 (1979) .. 8

Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656 (7th Cir. 1987), *cert. denied*, 484 U.S. 877 (1987) 11

Western Wholesale Liquor Co. v. Gibson Wine Co., 372 F. Supp. 802 (D.S.D. 1974) 11

Westman Com. Co. v. Hobart Int'l Inc., 796 F.2d 1216 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988) 11

Zinser v. Rose, 868 F.2d 938 (7th Cir. 1989) ... 7

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OPINIONS BELOW

The opinions below are adequately described in the Petition, however, the opinion of the Seventh Circuit Court of Appeals has been published at 968 F.2d 612.

STATEMENT OF JURISDICTION

The statement of jurisdiction is properly set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are properly set forth in the Petition.

STATEMENT OF THE CASE

The statement of the case set forth in the Petition fails to adequately describe Vital-Med Laboratories, Inc. and those allegations directed against it which were found to be insufficient by the Circuit Court. Further, the basis for the Circuit Court's ruling with respect to the Sherman Act is mischaracterized by Petitioners in the statement of the case.

Vital-Med Laboratories, Inc. ("Vital-Med") provided pathology and disposal services on fetal remains shipped to it in Northbrook, Illinois, by the Plaintiff-clinics, Delaware Women's Health Organization ("DWHO") and Summit Women's Health Organization ("SWHO"). It also performed these services for four other clinics managed by National Women's Health Organization, the management company for DWHO and SWHO. It no longer performs those services. Vital-Med was owned by Dr. Samuel Shih and Washington National Insurance Company.

Plaintiffs[1] originally filed this suit in 1986 against several pro-life advocates and their organizations. They sought injunctive relief and monetary damages resulting from those

[1] The term "Plaintiffs" refers to the Petitioners and the terms are used interchangeably.

Defendants' activities, which included picketing and blockading abortion clinics.

Vital-Med was not joined as a defendant until February, 1989. Plaintiffs' Second Amended Complaint against Vital-Med asserted Sherman Act violations and a pendent state-law statutory confidentiality claim. No RICO allegations were ever made against Vital-Med.

Plaintiffs alleged that in early 1988, an unidentified person claiming to be a Vital-Med employee telephoned co-Defendant Conrad Wojnar, and told him that fetal remains could be removed from the loading dock on Vital-Med's premises. The remains were then stolen from Vital-Med. Plaintiffs alleged that one or more unidentified Vital-Med employees saw the theft, but did nothing to stop it. The remains were shipped throughout the country and used in public burial ceremonies to denounce abortion.

Effective January 1, 1989, after the theft of fetal remains, Vital-Med stopped performing pathology and disposal services for these and other clinics. Since then, the Plaintiff-clinics obtained other sources for these services.

In Count I of the Second Amended Complaint, Plaintiffs contended that Vital-Med's complicity in removing fetal remains from its own premises and in ending abortion-related services violated the Sherman Act. They alleged that Vital-Med intended to force all abortion clinics out of business and deny women the opportunity to obtain an abortion. The Plaintiff-clinics claimed that their costs increased as a result of Vital-Med's decision to stop providing pathology services and that "[w]omen's health centers whose cost increase [sic] are less able to compete with other facilities offering the same or similar services."

Plaintiffs sought monetary damages and injunctive relief from Vital-Med (Second Amended Complaint, Count I). In

requesting injunctive relief, Plaintiffs effectively asked the District Court to force Vital-Med to resume a business it decided was unprofitable and bothersome.

The District Court granted co-Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy and the Pro-Life Action League, Inc., Motion to Dismiss the Second Amended Complaint for failure to state a cause of action (App. B).[2] Vital-Med, having answered the Second Amended Complaint after the Court denied its motion to dismiss, did not join in this motion.

The District Court held that the Sherman Act did not apply to a case "which involves the political opponents, not commercial competitors, and political objectives, not market place goals" (B-8). The District Court also dismissed those counts which alleged RICO violations on the basis that they did not state a cause of action (B-9). The District Court declined to entertain the pendent state law claims after its dismissal of the federal counts, and thus dismissed the entire case (B-17).

The Circuit Court affirmed the District Court's decision. Contrary to Petitioners' assertion that the Circuit Court based its ruling on an "unprecedented social cause" exemption from the Sherman Act, the opinion reveals that the basis for the Circuit Court's ruling was its determination that the focus of the Sherman Act is on matters dealing with "business competition." Quoting this Court's decision in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 n.15, the Circuit Court stated the "act was designed to prevent restraints of trade which had a significant effect on such competition." Applying that standard to the facts

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[2] Appendix page references are made to the appendices contained in the Petition.

before it, the Circuit Court concluded that "plaintiffs have not alleged that the defendants are exercising market power to harm their businesses" (A-19). Further, "[p]laintiffs have failed to make the required showing that the defendants have exerted market control of the supply of abortion services, control of price (beyond raising prices by increasing costs), or discrimination between would-be purchasers" (A-19). The Circuit Court's ruling was properly grounded in considerations of business competition which the Sherman Act was designed to protect. Moreover, the Circuit Court's decision was amply supported by case law. Petitioners' mischaracterization of the Circuit Court's decision is without merit and does not require the granting of a writ of certiorari.

SUMMARY OF ARGUMENT

Only the Sherman Act count of Plaintiffs' Second Amended Complaint is at issue before this Court as against Vital-Med. Count I failed to state an antitrust cause of action against Vital-Med for two reasons.

First, Plaintiffs did not allege any anti-competitive effect of the decision by Vital-Med to discontinue providing abortion-related laboratory services. One member's departure from the market does not alone result in "antitrust injury." Nor did Plaintiffs claim that Vital-Med's alleged complicity in the theft of fetal remains from its own property affected competition in the provision of abortion-related services. Without an allegation of cognizable damage or injury to competition as a whole, Count I was properly dismissed.

Second, Plaintiffs failed to allege that the actions of Vital-Med's co-defendants fell within the ambit of the Sherman Act. Actions taken by Vital-Med's co-defendants without commercial, anti-competitive effects cannot violate that statute.

ARGUMENT

PETITIONERS HAVE FAILED TO SHOW THAT THE SEVENTH CIRCUIT'S OPINION AFFIRMING DISMISSAL OF PETITIONERS' SECOND AMENDED COMPLAINT CONFLICTS WITH ANY DECISION OF THIS COURT OR WITH THE DECISIONS OF ANY CIRCUIT COURT OF APPEALS AND THE PETITION RAISES NO QUESTION WORTHY OF THE GRANTING OF A WRIT OF CERTIORARI.

The decision by the Court of Appeals is firmly grounded in well-established principles governing the application of the Sherman Act and is not inconsistent with any decision of this Court or with the decisions of any court of appeals and the petition raises no question worthy of the granting of a writ of certiorari.

Petitioners' Second Amended Complaint alleged that Vital-Med violated Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1) by participating in stealing fetal remains from its own premises and by discontinuing pathology services (Second Amended Complaint, ¶ 72). Neither of these activities, however, supports an antitrust claim against Vital-Med because Petitioners did not plead any facts to show that those actions had any anti-competitive effect in the clinics' product and geographic markets.

Petitioners failed to plead an antitrust cause of action for three reasons. They did not allege:

(1) that Vital-Med's decision to discontinue performing pathology services injured competition in the pathology laboratory industry which in turn damaged the clinics' business;

(2) that Vital-Med's claimed acquiescence in the theft of its property or its decision to discontinue performing pathology services reduced the number of

facilities performing abortions within the clinics' geographic areas; or

(3) that Vital-Med had the power to affect the relevant market.

The focus of antitrust law is injury to competitive conditions, not injury to a specific competitor. Allegations of "antitrust injury" are a prerequisite to maintaining suit. *Atlantic Richfield Co. v. USA Petroleum Co.*, ____ U.S. ____, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

A corollary to this rule is that "the Sherman Act does not preclude a party from unilaterally determining the parties with whom it will deal and the terms on which it will transact business." *Zinser v. Rose*, 868 F.2d 938, 940 (7th Cir. 1989) (*quoting, Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1205 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982)). *See also, Bunch v. Artec Int'l Corp.*, 559 F. Supp. 961, 967 (S.D.N.Y. 1983) (manufacturer permitted to terminate dealer or distributor unilaterally). The antitrust laws do not guarantee every competitor tenure in the marketplace. *Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir. 1982).

At best, Petitioners contended that Vital-Med's conduct had some sort of effect on a clinic in Wisconsin and one in Delaware (Second Amended Complaint, ¶ 83). Their reference to unspecified effects on "similarly-situated women's health centers" is insufficient to state an antitrust claim for those damages. An antitrust plaintiff "must allege nonconclusory facts establishing that there has been injury to the plaintiff's business or property and that the injury to the plaintiff's business or property occurred 'by reason of'

the antitrust violation." *Solinger v. A & M Records, Inc.*, 586 F.2d 1304, 1309 (9th Cir. 1978), *cert. denied sub nom. Motown Record Corp. v. Solinger*, 441 U.S. 908 (1979).

DWHO and SWHO are still in business (Second Amended Complaint, ¶¶ 6-8). They did not allege any loss of business as a result of Vital-Med's conduct. They claimed that their costs increased to cover "the expense of increased security, higher insurance premiums, higher rents, and mounting legal fees, among other things" (Second Amended Complaint, ¶ 87). They did not expressly allege that they have become less competitive, but averred generally that "[w]omen's health centers whose cost increase [sic] are less able to compete with other facilities offering the same or similar services" (Second Amended Complaint, ¶¶ 87, 89).

The clinics did not cite lost profits, or fewer patients. Instead, they claimed that Vital-Med's actions "have increased the cost and threaten to increase the cost, of having an abortion" (Second Amended Complaint, ¶ 87). They contended that those actions "have made it, and threaten to make it, more difficult for women to obtain abortions" (Second Amended Complaint, ¶ 88). They averred that those actions interfered with the clinics' ongoing business relations (Second Amended Complaint, ¶ 90).

It is difficult to see how these claimed effects relate to an injury to competition at large. Claiming "increased costs," "interference" and "difficulties" is one thing; relating them to a weakening of competition is another. Plaintiffs have done nothing to allege a causal link between any injury to the competitive system and their supposed damages and difficulties. Their one-line conclusions of "restrain[ing] interstate trade" and "an anticompetitive effect" do not state an antitrust cause for their claimed losses (Second Amended Complaint, ¶¶ 81-82).

Yet, even if Plaintiffs could tie any monetary losses to Vital-Med's conduct, that would not salvage their claim in the absence of injury to competition as a whole in the relevant market. In *Northeast Women's Center, Inc. v. McMonagle*, 670 F. Supp. 1300 (E.D.Pa. 1987), an abortion clinic filed an antitrust action, alleging that pro-life activists conspired to disrupt its business activities and that the defendants' actions were designed to force it out of business. The complaint sought injunctive relief and monetary damages.

The *McMonagle* court required the clinic to demonstrate that the defendants' acts reduced the number of abortion facilities within the clinic's geographic area. 670 F. Supp. at 1305. The district court held that the clinic could not maintain an antitrust action merely by contending that one competitor in a relevant geographic market lost profits or was eliminated from competition as a result of the defendants' actions. *Id.*, *citing*, *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 732 F.2d 1403 (9th Cir. 1984).

Plaintiffs' Second Amended Complaint did not allege that Vital-Med's actions reduced the number of facilities performing abortions within the clinics' geographic areas in Delaware and Wisconsin. They contended that all Defendants' actions "have forced, and threatened to force, women's health centers that perform abortions out of business" (Second Amended Complaint, ¶ 86), however, they named no closed clinics. Without allegations of reducing competition in the relevant market for abortion-related services, there can be no antitrust violation.

Because Plaintiffs alleged no "antitrust injury" from any of Vital-Med's actions, their antitrust count against Vital-Med was properly dismissed, aside from the reasons given

by the District Court. As one Circuit stated, "[i]f the failure to prove cognizable damages requires a judgment for the defendant notwithstanding the verdict * * * it follows that a failure to allege cognizable damage compels dismissal of the complaint." *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981), *cert. denied*, 454 U.S. 893 (1981).

Vital-Med is not a competitor of the Plaintiff-clinics. It performed pathology services; they do not (Second Amended Complaint, ¶¶ 6, 7, 65). Thus, this suit is nothing more than a claim of antitrust violations by a non-competitor without allegations of antitrust injury. One court described such a suit as "destined to fail." *Eastway Constr. Corp. v. New York*, 762 F.2d 243, 254 (2d Cir. 1985). Moreover, even if this Court could infer "antitrust injury" from Plaintiffs' Second Amended Complaint, dismissal was required since Plaintiffs did not allege that competition in the provision of pathology services was injured by Vital-Med's departure from the market.

The concept of injury to competition has spawned the "*per se*" and "rule of reason" lines of analysis to gauge the competitive reasonableness of a practice challenged under Section 1 of the Sherman Act. Vital-Med's discontinuation of abortion-related services could only be a vertical refusal to deal, which is examined under the "rule of reason" analysis. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). Under that analysis, a plaintiff must allege that the defendant's actions had an anti-competitive effect on the relevant geographic and product market in order to state a colorable antitrust claim. *Products Liability Ins. Agency, supra*; *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980).

Plaintiffs did not allege that Vital-Med's discontinuation of pathology services for DWHO and SWHO had an anti-competitive effect on the market for those services, since they did not allege that the clinics could not obtain the same services from another source. A seller's refusal to deal with a former buyer does not violate Section 1 of the Sherman Act, even if its products are available to the buyer only at a higher price. *See, e.g., Westman Com. Co. v. Hobart Int'l Inc.*, 796 F.2d 1216 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); *Determined Productions, Inc. v. R. Dakin & Co.*, 514 F. Supp. 645 (N.D.Cal. 1979), *aff'd without op.*, 649 F.2d 866 (9th Cir. 1981); *Western Wholesale Liquor Co. v. Gibson Wine Co.*, 372 F. Supp. 802 (D.S.D. 1974).

Section 1 does not proscribe refusals to deal absent a showing of a seller's "market power." *Westman*, 796 F.2d at 1229; *Polk Bros., Inc. v. Forest City Ent., Inc.*, 776 F.2d 185 (7th Cir. 1985). Market power is a seller's ability to restrict the availability of goods or services and raise the price for those goods and services above competitive levels. *National Collegiate Athletic Assoc. v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). An antitrust defendant without market power has no burden to justify its allegedly anti-competitive conduct. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir. 1987), *cert. denied*, 484 U.S. 877 (1987); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986), *reh'g denied en banc*, 788 F.2d 1223 (7th Cir. 1986).

Plaintiffs' Second Amended Complaint did not allege any facts to show that Vital-Med had any power to restrict the availability of pathology and disposal services to abortion clinics. They also did not allege that Vital-Med had the power to raise prices above competitive levels. The

fifteen skeletal paragraphs of the antitrust count mention nothing about Vital-Med's market power (Second Amended Complaint, ¶¶ 79-93).

All Petitioners alleged is that they were no longer able to deal with Vital-Med (Second Amended Complaint, ¶ 76). They did not aver that their "difficulties" were produced by a more restrictive market for pathology services. Nor did they claim that Vital-Med's decision resulted in abortion clinic closings or fewer abortions being performed at the Plaintiff-clinics. They failed to state the relevant market for pathology services, or anything about Vital-Med's power within that market.

Petitioners erroneously claim that the Circuit Court's decision conflicts with the Eighth Circuit's decision in *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920) (Petition at 6). Petitioners contend that the Seventh Circuit's opinion would call for the implicit overruling of numerous decisions of this Court (Petition at 21, 28). Petitioners' claims are misguided and mistakenly based on a mischaracterization of the Seventh Circuit's decision.

The clear basis for the Circuit Court's decision in the instant matter is its finding that the Petitioners failed to allege that the defendants exercised market power to harm Petitioners' businesses (A-19). The Seventh Circuit correctly held that Petitioners failed to make the required showing that the defendants exerted market control of the supply of abortion services, control of price (beyond raising prices by increasing costs), or discrimination between would-be purchasers (A-19).

Petitioners simply ascribe too much to the Circuit Court's treatment of *Council of Defense*. The Circuit Court found the decision in *Council of Defense* not to be controlling in light of this Court's decision in *NAACP v. Claiborne*

Hardware Co., 458 U.S. 886 (1981) (A-19). However, the Circuit Court did not base its ruling on the holding in *Claiborne Hardware* but rather found that that decision shed doubt upon the holding enunciated in *Council of Defense* and accordingly shed doubt upon Petitioners' reliance upon it. Under these circumstances, Petitioners' characterization of the Seventh Circuit's decision as "conflicting" with the Eighth Circuit's decision in *Council of Defense* is extreme and does not mandate granting of a writ of certiorari to the Court of Appeals.

Further doubt is cast upon the weight given by Petitioners to their assertion that the Seventh Circuit's decision directly conflicts with *Council of Defense* when considered in light of Petitioners' failure to address this Court's decision in *Apex Hosiery* upon which the Seventh Circuit strongly relied. In considering the *Apex Hosiery* decision the Circuit Court stated "[t]he Court rejected the union's contention that all labor activities are exempt from Sherman Act, *Id.* at 487, just as we reject defendants' contention that all "protest" or non-commercially oriented activities are exempt because of the First Amendment," (*quoting*, *Apex Hosiery*, 310 U.S. at 487 (A-18). Continuing to quote from *Apex Hosiery* the Circuit Court noted that "[t]he Sherman Act was not enacted . . . to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be purchasers," (*quoting*, *Apex Hosiery*, 310 U.S. at 512 (A-18). Finally, "[r]estraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence." *Id.* at 513. Thus, to the extent the Seventh Circuit's decision does conflict with the Eighth Circuit's

decision in *Council of Defense*, it is clearly in accordance with this Court's decision in *Apex Hosiery*.

In sum, Petitioners' antitrust count against Vital-Med omitted many of the essential elements of a private antitrust cause of action, most particularly antitrust injury and anti-competitive effect. These omissions are fatal, and warranted the Circuit Court's affirmance of the District Court's dismissal of Count I of the Second Amended Complaint. Accordingly, there are no questions worthy of the granting of a writ of certiorari to the Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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